

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Scott Chernoff,

06-CV-2897
(CPS)(CLP)

Plaintiff,

- against -

MEMORANDUM
OPINION AND
ORDER

The City of New York; New York City Police Pension Fund; Michael D. Welsome, Director New York City Police Pension Fund; Raymond Kelly, Police Commissioner; Julius Mendel, M.D., Medical Board, New York City Police Pension Fund; Richard Gasalberti, M.D., Medical Board, New York City Police Pension Fund; Arsen Pankovich, M.D. Medical Board, New York City Police Pension Fund, each being sued individual and in their official capacities as employees of the NYPD and/or the NYCPFF,

Defendants.

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SIFTON, Senior Judge.

Plaintiff Scott Chernoff commenced this action on June 9, 2006 against defendants the City of New York ("City"); the New York City Police Pension Fund (the "Police Pension Fund"); Michael D. Welsome, Director of the New York City Police Pension Fund; Raymond W. Kelly, Police Commissioner; Julius Mendel, M.D., Richard Gasalberti, M.D., and Arsen Pankovich, M.D., of the New York City Police Pension Fund Medical Board; Julie L. Schwartz, Kathleen M. Kearns, Louis W. Luciani, Carl Princi, Walter Cacaj, and John Doe Police Officers # 1-4, of the New York Police Department ("NYPD") Advocate's Office, each sued in their

individual and official capacities. On September 11, 2008, I granted summary judgment in defendants' favor on plaintiff's disability discrimination claims, substantive due process claim under 42 U.S.C. § 1983, and procedural and substantive due process claims under the Fifth Amendment.¹ *Chernoff v. City of New York*, No. 06-CV-2897, 2008 WL 4239161 (E.D.N.Y. Sept. 11, 2008). The following claims remain to be determined: (1) plaintiff's procedural due process claim under § 1983, to the extent that plaintiff claims his procedural due process rights were violated on account of established state procedures²; and (2) plaintiff's claim for deprivation of his constitutional rights under § 1983.³ Presently before this Court is defendants'

¹ In addition, on November 19, 2007, the parties stipulated to the dismissal of the following defendants with prejudice: Julie L. Schwartz, Kathleen N. Kearns, Louis W. Luciani, Carl Princi, Walter Cacaj, and John Doe Police Officers 1-4. The parties also agreed to the withdrawal of the following claims with prejudice: false imprisonment, abuse of authority, infringement of right to due process, and conspiracy to interfere with civil rights.

After defendants filed their first motion for summary judgment, plaintiff, in his brief in opposition, withdrew his "retaliation" and "hostile work environment" claims. In my September 11, 2008 memorandum and opinion, I construed plaintiff's withdrawal as relating to all of the retaliation and hostile work environment claims asserted in the complaint, including plaintiff's retaliation and hostile work environment claims under § 1983. *Chernoff*, 2008 WL 4239161 at *1 n.1.

² In my previous decision, I determined that "[t]o the extent that plaintiff claims his procedural due process rights were violated on account of random, unauthorized acts on the part of defendants, an Article 78 proceeding provided the proper course of action and plaintiff's procedural due process claims fail as a matter of law." *Chernoff*, 2008 WL 4239161 at *7. However, because the parties did not address whether defendants acted pursuant to established state procedures in determining plaintiff's disability pension eligibility, I held that plaintiff's procedural due process claim could not be dismissed as a matter of law. *Id.*

³ In my previous decision, I considered only plaintiff's § 1983 due process claims, reasoning as follows:

renewed motion for summary judgment with respect to these claims. For the reasons set forth below, defendants' motion is granted.

BACKGROUND

Familiarity with the underlying facts and circumstances of this case is presumed based on the factual background recited in my memorandum opinion addressing defendants' first motion for summary judgment. See *Chernoff*, 2008 WL 4239161, at *1-5. What follows is a recent procedural history of this case.

On November 3, 2008, I granted defendants leave to renew their motion for summary judgment to address plaintiff's remaining claims. During a December 11, 2008 telephone conference with Magistrate Judge Pollack, plaintiff was directed to and agreed to identify his remaining claims under § 1983, aside from his procedural due process claim. Plaintiff's Rule 56.1 Statement dated February 13, 2009 ("Pl.'s Stmt.") ¶ 7. By letter dated December 11, 2008, plaintiff stated that his remaining § 1983 claims other than his procedural due process claim were for "disability discrimination (Count IV), retaliation

[Plaintiff's] amended complaint alleges that defendants deprived him of his "constitutional rights, including the rights: to enjoy freedom of speech, movement, association and assembly, to petition his government for redress of his grievances, to be secure in his person, to be free from unreasonable search and seizures, to enjoy privacy, to be free from deprivation of life, liberty, and property without due process of law." Second Amended Complaint ¶ 79. Since defendants' summary judgment motion focuses on plaintiff's due process claims, I only consider the due process claims.

Chernoff, 2008 WL 4239161 at *7 n.9.

(Count V) and hostile work environment (Count IV) [sic]." *Id.* Defendants' renewed motion for summary judgment followed on January 5, 2009. During the briefing of this motion, plaintiff withdrew his hostile work environment claim under § 1983.

DISCUSSION

I. Summary Judgment Standard

A court must grant a motion for summary judgment if the movant shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Elec. Inspectors, Inc. v. Vill. of E. Hills*, 320 F.3d 110, 117 (2d Cir. 2003). A fact is material when it "might affect the outcome of the suit under the governing law." *Id.*

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1987). In order to defeat such a motion, the non-moving party must raise a genuine issue of material fact. Although all facts and

inferences therefrom are to be construed in the light most favorable to the non-moving party, the non-moving party must raise more than a "metaphysical doubt" as to the material facts. *See Matsushita*, 475 U.S. at 586; *Harlen Assocs. v. Vill. of Mineola*, 273 F.3d 494, 498 (2d Cir. 2001). The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990). Rather, the non-moving party must produce more than a scintilla of admissible evidence that supports the pleadings. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968); *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir. 2003). In deciding such a motion, the trial court must determine whether "after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir. 2000).

II. Section 1983 Claims

"Section 1983 provides an instrument by which an individual deprived of a federal right by a person acting under color of state law may be compensated." *Eagleston v. Guido*, 41 F.3d 865, 875 (2d Cir. 1994) (citing *Parratt v. Taylor*, 451 U.S. 527, 535

(1981)).⁴ Section 1983 itself creates no substantive rights; it provides "only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993), *cert. denied*, 512 U.S. 1240 (1994). "It is well established that in order to state a claim under § 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States." *Id.* at 875-76 (quoting *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir. 1993)).

There is no dispute that defendants were, at all relevant times, acting under color of state law. In his various § 1982 claims, plaintiff contends that defendants deprived him of his rights under the Fourteenth Amendment to the Constitution: in particular, his property interests in his employment and his retirement benefits.

A. *Procedural Due Process Claim*

The remaining portion of plaintiff's § 1983 procedural due

⁴ 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]

42 U.S.C. § 1983.

process claim asserts that plaintiff was denied procedural due process when defendants, according to established state procedures,⁵ took disciplinary measures against him and determined that he was ineligible for service-related accidental disability retirement benefits. In order to determine whether defendants deprived plaintiff of his right to procedural due process, I must consider "two threshold questions . . . whether the plaintiff possessed a liberty or property interest protected by the United States Constitution or federal statutes, and, if so, what process was due before the plaintiff could be deprived of that interest." *Green v. Bauvi*, 46 F.3d 189, 194 (2d Cir. 1995). I consider these questions in turn.

With regard to plaintiff's possession of a protected liberty or property interest, I note that until his retirement in 2005, plaintiff was employed by New York City as a police officer. Section 14-115 of the New York City Administrative Code provides that New York City police officers may be disciplined or terminated "only on written charges made or preferred against

⁵ As I noted in my prior opinion, "there is no [procedural due process] violation (and no available § 1983 action) when there is an adequate state postdeprivation procedure to remedy a random, arbitrary deprivation of property[.]" *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 882 (2d Cir. 1996) (emphasis in original) (citations omitted). Because a postdeprivation procedure was available to plaintiff in the form of an Article 78 proceeding, see N.Y. C.P.L.R. § 7803(3), I held that "[t]o the extent that plaintiff claims his procedural due process rights were violated on account of random, unauthorized acts on the part of defendants, an Article 78 proceeding provided the proper course of action and plaintiff's procedural due process claims fail as a matter of law." *Chernoff*, 2008 WL 4239161, at *7.

them, after such charges have been examined, heard and investigated by the commissioner or one of his or her deputies," with notice to the offending officer. N.Y.C. Admin. Code § 14-115. There is no question that "[a] public employee who has a right not to be fired without 'just cause' . . . has a property interest in [his] employment that qualifie[s] for the protections of procedural due process." *Otero v. Bridgeport Hous. Auth.*, 297 F.3d 142, 151 (2d Cir. 2002) (internal citations omitted). In addition, the Second Circuit has held that "municipal employee retirement benefits are constitutionally protected property," and that "[t]he entitlement to disability retirement is a constitutionally protected property interest for purposes of Section 1983." *Russell v. Dunston*, 896 F.2d 664, 668-69 (2d Cir. 1990) (citing, *inter alia*, *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Therefore, plaintiff possesses constitutionally protected property interests in his employment and in his retirement benefits, which are entitled to the protections of procedural due process.

Having concluded that plaintiff possesses protected property interests, I proceed to determine what process is due to plaintiff before he may be deprived of these interests. With regard to the disciplinary measures taken against plaintiff, which could have resulted in plaintiff's termination, the Supreme Court has held that where a public employee is entitled to

procedural due process in connection with threatened termination, the requirement of due process is satisfied if the employee receives: (i) notice of the adverse disciplinary charges; (ii) an opportunity to respond prior to termination; and (iii) a full post-termination hearing. See *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The procedures made available to plaintiff in connection with the disciplinary charges against him satisfied this standard. In April of 2003 and January of 2004, defendants supplied plaintiff with advance written notice of two sets of disciplinary charges issued against him. They also afforded plaintiff an opportunity to be heard on the charges. When plaintiff and his then-counsel appeared for trial on the charges in August of 2004, plaintiff agreed to plead guilty to the charges and to enter into a negotiated settlement, which did not result in his termination. Therefore, no post-termination hearing was necessary. Having provided adequate notice to plaintiff and an opportunity to respond, defendants satisfied their due process obligations to plaintiff in connection with the disciplinary charges.

Turning to the process due to plaintiff in connection with his application for an accidental disability pension, courts in this circuit have repeatedly held that the procedures available to police officers seeking accidental disability retirement pensions satisfy due process requirements. See, e.g., *McDarby v.*

Dinkins, 907 F.2d 1334, 1337 (2d Cir. 1990); *Calzarano v. Bd. of Trustees of the Police Pension Fund*, 877 F.Supp. 161, 164 (S.D.N.Y. 1995). In *McDarby*, a case in which a police officer asserted a procedural due process claim following the denial of his application for an accidental disability pension, the Second Circuit stated as follows:

The procedures employed by the Medical Board and the Board of Trustees in determining *McDarby*'s pension eligibility closely parallel those we upheld as meeting the basic "notice" and "hearing" requirements of procedural due process in *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978). *McDarby*'s complaint makes clear that the Medical Board physically examined him, received written submissions that were proffered on his behalf, reviewed his medical records, and reconsidered its original adverse determination upon his request. Due process requires no more.

McDarby, 907 F.2d 1334, 1337. The procedures described in *McDarby* were made available to plaintiff here. In March of 2004, plaintiff received written notice that the NYPD Supervising Chief Surgeon had recommended that he be examined by the Police Pension Fund Medical Board ("Medical Board") to determine whether he should be involuntarily retired with accident or ordinary disability benefits.⁶ On May 24, 2004, the Medical Board

⁶ The notice stated, *inter alia*, as follows:

[T]he Police Commissioner has recommended that the Police Pension Fund Article 2 Medical Board examine you to determine if you should be retired on an Accident or Ordinary Disability Retirement. If the Article 2 Medical Board determines that you are disabled from the performance of full police duties, and the Police Pension Fund Board of Trustees concurs, you will be retired on a Disability Retirement. If the Police Commissioner's application is for Ordinary Disability Retirement and you believe your disability was the natural and proximate result of a line of duty accident, you may apply for, and be considered for, an Accident Disability Retirement.

examined plaintiff, reviewed his medical records, and recommended that plaintiff be retired with ordinary disability benefits. Thereafter, on June 4, 2004, plaintiff applied for service-related accidental disability retirement. Plaintiff was afforded the opportunity to submit any evidence he wished in support of his application. After reviewing the medical records available to it, including materials submitted by plaintiff, the Medical Board denied plaintiff's application on April 4, 2005. Following two subsequent applications, during which the Board interviewed plaintiff and reviewed additional materials he submitted in support of his application, the Board reconsidered and again denied plaintiff's application for accidental disability benefits on November 14, 2005 and May 8, 2006. No reasonable fact-finder could find that plaintiff was not afforded his basic procedural rights to notice and a hearing via these procedures, and accordingly, defendants met the requirements of procedural due process with regard to plaintiff's disability benefits application.

Plaintiff himself concedes that the procedures made available to him in connection with the disciplinary charges and his disability benefits application were not deficient; rather, he argues that "it was the discriminatory manner in which these

Declaration of Lawrence J. Profeta dated January 5, 2009 ("Profeta Decl."), Ex. 18, ¶¶ 1-3 (internal paragraph numbering omitted).

procedures and processes were applied against plaintiff that is the bases [sic] of his claims." Pl.'s Mem. in Opp'n at 5. I have already ruled upon plaintiff's various discrimination claims in defendants' favor. See *Chernoff*, 2008 WL 4239161, at *5-6. To the extent that plaintiff now argues that defendants did not abide by their own policies or regulations with regard to required procedures, a § 1983 claim is not the proper vehicle for resolution of this dispute. The Second Circuit has endorsed the view that "[w]hen the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations." *McDarby*, 907 F.2d at 1337-38 (internal citations omitted). Accordingly, "the enforcement of state regulations . . . is to be done through the state court system and not in an action under 42 U.S.C. §§ 1981 [or] 1983, where no federal constitutional guarantees have been violated." *Id.* at 1338. No reasonable fact-finder could find that basic requirements of due process were not met with regard to the disciplinary charges against plaintiff and plaintiff's application for accidental disability benefits. Accordingly, summary judgment is granted in defendants' favor on plaintiff's procedural due process claim.

B. *Disability Discrimination Claim*

In his December 11, 2008 letter to defendants, plaintiff

stated that his remaining § 1983 claims included a claim for disability discrimination. See Profeta Decl. Ex. 7 (copy of letter). Plaintiff, however, has not discussed his allegedly remaining § 1983 disability discrimination claim in his opposition papers. The Amended Complaint does not set forth the constitutional or statutory basis upon which plaintiff's § 1983 disability discrimination claim is predicated. See Am. Compl. ¶¶ 79-85. Even assuming that plaintiff's § 1983 disability discrimination claim alleges a violation of the Americans with Disabilities Act ("ADA"), see 42 U.S.C. § 12132, it is doubtful that plaintiff could properly assert such a claim.⁷ In any case, I have already determined that defendants' conduct did not violate the ADA. *Chernoff*, 2008 WL 4239161, at *5-6.

⁷ As another court in this district recently noted:

[A]t least one court in this Circuit has held that a plaintiff cannot recover under § 1983 for violations of [the ADA]. See *Bartlett v. New York State Bd. of Law Examiners*, 970 F.Supp. 1094, 1144-45 (S.D.N.Y. 1997), *aff'd in part and vacated in part on other grounds*, 156 F.3d 321 (2d Cir.1998), *vacated on other grounds*, 527 U.S. 1031 (1999). "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.'" *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting *Wright v. City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418 (1987)). Congress's intent to foreclose § 1983 actions for the violation of certain statutes may be implied when "the statutes at issue themselves provide[] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*, 479 U.S. at 427. Accordingly, in *Bartlett*, Judge Sotomayor reasoned that, because "the ADA and the Rehabilitation Act provide 'sufficiently comprehensive' remedies for violations of plaintiff's rights," the plaintiff was foreclosed from recovering under § 1983 as well. *Bartlett*, 970 F.Supp. at 1145.

Stamm v. New York City Transit Auth., No. 04-CV-2163, 2006 WL 1027142, at *7 n.1 (E.D.N.Y. Feb. 7, 2006).

Accordingly, assuming plaintiff's § 1983 disability discrimination claim survived defendants' first motion for summary judgment, summary judgment on that claim is granted in defendants' favor.

C. *Retaliation Claim*

Finally, plaintiff argues that defendants violated § 1983 when they brought disciplinary charges against him and denied his application for accidental disability retirement in retaliation for the exercise of his constitutional rights. As an initial matter, I note that plaintiff withdrew his retaliation claims during the briefing of defendants' first motion to dismiss.

Chernoff, 2008 WL 4239161 at *1 n.1; see also *supra* n.1.

Plaintiff now contends that he withdrew only his retaliation claim under the ADA, not his § 1983 retaliation claim. Pl.'s Mem. in Opp'n at 11. Even if I were to assume that plaintiff has not withdrawn his § 1983 retaliation claim, however, I conclude that the claim fails on its merits.

The Second Circuit has recognized that "a claim for relief may be stated under section 1983 if otherwise routine administrative decisions are made in retaliation for the exercise of constitutionally protected rights." *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987). "In order to state a claim for retaliation under section 1983, a plaintiff must show that: (1) his actions were protected by the Constitution or federal law;

and (2) the defendant's conduct complained of was in response to that protected activity." *Friedl v. City of New York*, 210 F.3d 79, 85 (2d Cir. 2000) (internal quotation marks omitted) (citing *Posr v. Court Officer Shield # 207*, 180 F.3d 409, 418 (2d Cir. 1999)). Although he asserts that he "exercised his constitutional right to obtain an accidental disability pension," or "his right to, at the very least, obtain an ordinary disability pension based upon ten years of service," Pl.'s Mem. in Opp'n at 11-12, plaintiff has not clearly identified the constitutional or federal rights the exercise of which allegedly occasioned retaliation by defendants.⁸ Even assuming, without deciding, that plaintiff's actions in applying for a disability pension were constitutionally protected, no reasonable fact-finder could find that the conduct of which plaintiff complains was pursued in response to those actions.

Plaintiff first applied for accidental disability benefits on June 4, 2004. Much of the conduct of which plaintiff complains -- such as the disciplinary charges issued against him, his 31-day suspension, and the alleged misrepresentation as to

⁸ In his Amended Complaint, plaintiff asserts that defendants violated several of his constitutional rights, but does not explain how his application for a disability pension is protected by the rights he claims were violated. See Am. Compl. at ¶ 87 (alleging that defendants, in violation of § 1983, conspired "to deprive plaintiff of his pension and constitutional rights, including the rights: to enjoy freedom of speech, movement, association and assembly, to petition his government for redress of his grievances, to be secure in his person, to be free from unreasonable searches and seizures, to enjoy privacy, to be free from deprivation of life, liberty and property without due process of law").

the cause of plaintiff's mental condition in a report by the Psychological Evaluation Unit of the NYPD -- occurred prior to June 4, 2004, and thus could not have been motivated by retaliatory animus. Plaintiff also complains of defendants' February 1, 2005 recalculation of his retirement date from March 30, 2005 to January 12, 2005, which rendered plaintiff ineligible for the maximum benefits under the ordinary disability pension plan. Defendants assert, however, that the recalculation was not made in retaliation for plaintiff's actions, but rather pursuant to the terms of the negotiated settlement relating to plaintiff's disciplinary charges. In that agreement, which was approved on October 25, 2004, plaintiff agreed to "waive all accrued time and leave balances" and to "immediately rescind" his prior deferral of adjudication of his retirement application "in order for his disability pension application to be calendared at the Police Pension Fund (PPF) at the earliest opportunity." Profeta Decl. Ex. 23 (copy of agreement), Ex. 24 (October 25, 2005 approval of agreement and disposition of charges by NYPD Commissioner). Plaintiff did not submit his retirement paperwork until January 27, 2005, however, and was informed on the same day that an audit of his time record would be performed. *Id.* Ex. 25 ("Retiree Data Sheet" dated January 27, 2005 reflecting potential March 30, 2005 retirement date in light of terminal leave balances); Ex. 26 (acknowledgment of future audit signed by plaintiff and dated

January 27, 2005). On February 1, 2005, defendants readjusted plaintiff's retirement date to January 12, 2005, the date the NYPD Pension Fund's Board of Trustees approved plaintiff for ordinary disability retirement benefits. *Id.* Ex. 27 at 21:8-22:2 (deposition testimony of defendant Kathy Kearns, NYPD managing attorney). According to defendants, the readjustment was performed so as to comply with the terms of the negotiated agreement, which required plaintiff to rescind the deferral of consideration of his benefits application and effectively vacated plaintiff's accrued time and leave balances. *Id.*

Defendants have offered a legitimate, non-retaliatory reason for their recalculation of plaintiff's retirement date by reference to the terms of the negotiated settlement. Plaintiff's rebuttal consists of conclusory allegations that defendants' proffered explanation is pretextual and denials that he agreed to waive accrued time and leave balances. A non-moving party "may not rest upon mere conclusory allegations or denials" to survive a motion for summary judgment. *Sec. and Exch. Comm'n v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). Construing all of the facts and drawing all inferences in the light most favorable to plaintiff, no reasonable fact-finder could find that the recalculation of plaintiff's retirement date was motivated by retaliatory animus towards plaintiff on account of his application for service-related accident disability benefits.

Accordingly, defendants' motion for summary judgment on plaintiff's § 1983 retaliation claim is granted.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is granted. The Clerk is directed to transmit a copy of the within to the parties and the Magistrate Judge.

SO ORDERED.

Dated: Brooklyn, NY
March 25, 2009

By: /s/ Charles P. Sifton (electronically signed)
United States District Judge